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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 1438

SCHMUTZ MANUFACTURING COMPANY, INC.
Petitioner,

vs.

DONALD L. ATKINS
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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Schmutz Manufacturing Company, Inc., prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fourth Circuit, entered in the above-entitled case on December 10, 1970.

CITATIONS TO OPINIONS BELOW

The opinions of the Court of Appeals for the Fourth Circuit, on the second rehearing en banc, are not yet officially reported, but are printed as Appendix A to this petition.

The opinions of the Court of Appeals for the Fourth Circuit, on the first rehearing en banc, have been withdrawn by the Court, but are printed as Appendix B to

this petition. The opinions of the Court, on the initial hearing by a three-judge panel, are printed as Appendix C and reported at 401 F.2d 731 (4th Cir. 1968).

The opinion of the United States District Court for the Western District of Virginia is printed as Appendix D and reported at 268 F. Supp. 406 (1967).

JURISDICTION

The judgment of the Court of Appeals for the Fourth Circuit, on the second rehearing en banc, was entered on December 10, 1970. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

QUESTION PRESENTED

In a diversity action is the tolling effect of a prior federal diversity action on a state limitation period to be determined by the state's tolling rule, or by a "federal tolling rule" inferred, by the Court below, from the "relatively unitary" nature of the federal court system?

STATUTE INVOLVED

The state tolling rule applicable in the instant case is stated in Section 8-34 of the Virginia Code (1950) which provides that:

> If an action or suit commenced within due time in the name of or against one or more plaintiffs or defendants abate as to one of them [1] by the return of no inhabitant or [2] by his or her death or marriage, or [3] if in an action or suit commenced within due time judgment or decree for the plaintiff shall be arrested or reversed upon a ground which does not preclude a new action or suit for the same cause, or [4] if there be occasion to bring a new action or suit by reason of the loss or destruction of any of the papers or records in a former suit or action which was in due time; in every such case, not-

withstanding the expiration of the time within which a new action or suit must otherwise have been brought, the same may be brought within one year after such abatement or such arrest, or reversal of judgment or decree, or such loss or destruction, but not after.

STATEMENT OF THE CASE

On June 22, 1961, plaintiff (respondent herein) allegedly was injured at South Boston, Virginia, when he fell into a machine manufactured by the defendant (the petitioner herein). Defendant is a Kentucky corporation whose only place of business was, and is, in Louisville, Kentucky.

Plaintiff reasonably concluded that defendant could not be sued in Virginia because Virginia did not enact a "long-arm statute" [1] until June 26, 1964, which was one year after the applicable Virginia limitation period [2] (two years) would have expired. Plaintiff, therefore, brought suit in Kentucky, in the United States District Court for the Western District of Kentucky. The suit was filed three days less than two years from the date of the injury.

The suit was untimely if the Kentucky statute of limitations applied, because Kentucky law specified a one-year period of limitation for causes of action of the type asserted by the plaintiff.[3] However, at the time suit was brought in Kentucky, the timeliness of a suit on a cause of action arising in another state, was understood to be governed by the limitations statute of the other state, if that statute permitted the suit to be brought later than the Kentucky statute. Nonetheless, while plaintiff's suit was pending, the Kentucky Court of Appeals, in over-

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[1] VA. CODE § 8-81.2 (1964).

[2] VA. CODE § 8-24 (1950).

[3] KY. REV. STAT. § 413.140.

ruling several of its prior decisions, ruled that the Kentucky statute of limitations would govern despite the longer limitation period of another state.[4] The Court, in addition, specified that this rule was to be applied retrospectively.[5]

Thereafter, defendant filed a motion for summary judgment on the ground that suit was barred in Kentucky. The motion was granted by the district court on June 30, 1965. On February 16, 1967, the United States Court of Appeals for the Sixth Circuit affirmed the district court, and on March 9, 1967, issued its mandate.[6]

Before that mandate became final, the instant suit for personal injuries was filed in the United States District Court for the Western District of Virginia, on March 13, 1967. Service was had on defendant pursuant to Section 8-81.2 of the Code of Virginia, effective in 1964. Thus, the instant case was filed almost three years after the Virginia "long-arm statute" had become effective and nearly six years after the injury had occurred.

Defendant immediately moved for summary judgment asserting that the action was barred by the Virginia two-year statute of limitations. The District Court granted the motion and dismissed the action finding that the Kentucky action did not suspend the running of the limitation period under the Virginia tolling statute.[7] The District Court judgment was affirmed, in a two-to-one decision, by a three-judge panel of the United States Court of Appeals for the Fourth Circuit on September 10, 1968.[8]

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[4] *Seat* v. *Eastern Greyhound Lines, Inc.*, 389 S.W.2d 908 (Ky. Ct. App. 1965).

[5] *Wetherington* v. *Griggs*, 392 S.W.2d 56 (Ky. Ct. App. 1965).

[6] *Atkins* v. *Schmutz Manufacturing Co.*, 372 F.2d 762 (6th Cir. 1967). The plaintiff's petition for a writ of certiorari was denied by this Court on October 9, 1967. 389 U.S. 829.

[7] See Appendix D.

[8] See Appendix C.

On the first rehearing en banc the Court of Appeals upheld the dismissal as to defendant but *sua sponte* ordered defendant's insurance carrier added to the suit as a party estopped to plead the statute of limitations.[9] After the second rehearing en banc all opinions and orders issued as a result of the first rehearing were withdrawn (including the order adding defendant's insurer as a party) and the prior orders dismissing the action were reversed.[10] The Court's rationale for holding the plaintiff's action timely was that where the prior action was brought in federal court the tolling effect of that action upon a state limitation period would have to be determined not by state tolling rules but by a "federal tolling rule" which would "properly take account of federal interests and the effective functioning of the federal courts as a cohesive, relatively unitary, system for the administration of justice." In its opinion the Court recognized that

> Literal application of some of the language in *Guaranty Trust Company* v. *York*, *supra* [326 U.S. 99 (1945)], might appear to compel a conclusion that a federal court must apply state law in every case where failure to do so might make a difference in the outcome of the litigation. Appendix A, p. 19a.

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[9] See Appendix B. This decision provoked a vigorous dissent by Chief Judge Haynsworth, who was to be the author of the majority opinion on the second en banc rehearing. In his dissent Judge Haynsworth stated

> Liberty [Mutual Insurance Company, the defendant's insurance carrier, has] fully discharged its fiduciary obligations to Atkins. With respect to them, it has done all of those things it ought to have done; it has done none of those things it ought not to have done. To impose disabilities upon it under those circumstances, seems to me to be without foundation either in law or morality. Appendix B. p. 16b.

As noted above, the decision to which the dissent relates was later withdrawn.

[10] See Appendix A.

However, the Court also indicated its belief that the language of *Guaranty Trust* had been "moderated." Appendix A, p. 19a.

REASONS FOR GRANTING THE WRIT

I.

THE "FEDERAL TOLLING RULE" FORMULATED BY THE COURT BELOW WOULD PERMIT THE MAINTENANCE IN FEDERAL COURTS OF SUITS BARRED BY STATE LAW AND, HENCE, WOULD ENCOURAGE INCREASED RESORT TO, AND OVERBURDENING OF, FEDERAL COURTS IN DIVERSITY ACTIONS.

The court below has ruled that a diversity action in federal court can toll the running of a state limitation period regardless of the tolling rules of the state. This "federal tolling rule," and the requirement that it be applied, arises, the lower court says, from the "relatively unitary" nature of the federal court system.

The effect of the "federal tolling rule" is to permit the maintenance in federal courts of suits, like the subject suit,[11] which would be barred by state law. As a result,

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[11] In *Jones* v. *Morris Plan Bank*, 170 Va. 88, 195 S.E. 525 (1938) the Virginia tolling rule was held to bar actions such as the present one. See also, *Brunswick Land Corp.* v. *Perkinson*, 153 Va. 603, 608, 151 S.E. 138, 140 (1930) ("It is . . . well settled that in its terms the [Virginia tolling] statute is absolute, admitting of no exceptions which [the statute] itself does not recognize . . . .")

The court below all but admits that Virginia law would have barred the instant action. At best, the majority concedes, "one *may* doubt" whether *Jones* would be followed "mechanistically" and one "cannot be confident . . . [that] *Jones* would *necessarily* compel" a conclusion that the instant action was barred. Appendix A, pp. 8a, 5a; emphasis added.

The majority's obliquely-suggested reservations about the conclusiveness of *Jones* rest entirely on *Weinstein* v. *Glens Falls Insurance Co.*, 202 Va. 722, 119 S.E.2d 497 (1961). Likewise, *Weinstein*

plaintiffs in future diversity actions will bring their actions in federal rather than state courts wherever a tolling question might conceivably arise. Moreover, because application of the federal tolling rule requires that federal courts be preferred over state courts in both a pending action and the prior action, the burden of a single claim on federal courts would be felt doubly.

It should also be noted that the rationale used to support a federal tolling rule would also support a federal statute of limitations. The court below states that a federal tolling rule is necessary

> properly [to] take account of federal interests and the effective functioning of the federal courts as a cohesive, relatively unitary, system for the administration of justice. Appendix A, p. 19a.

The concurring judges properly point out that if this

> notion of an "institutional interest" in the uniform management of the federal court system . . . is sufficient to support a federal rule of tolling . . . it favors the application of a federal statute of limitations just as strongly . . . . Appendix A, p. 25a.

Thus, diversity-action plaintiffs might sue in federal courts not only to avoid state tolling rules but in an attempt to avoid state limitation periods as well.

That considerations of the law to be applied would dictate the choice of a federal over a state court, of course, runs directly counter to the principles enunciated by this Court in *Erie R.R.* v. *Tompkins*, 304 U.S. 64 (1938), and, more particularly, in *Guaranty Trust* v. *York*, 326 U.S. 99 (1945).

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is the so ›asis for the concurring judges' assertion that Virginia law might permit the suit. In fact, however, *Weinstein* is wholly inapposite: it was decided by the Virginia Supreme Court as a case involving contractual, not statutory, limitations and the Virginia tolling statute was neither discussed nor, indeed, cited.

II.

IN FORMULATING ITS "FEDERAL TOLLING RULE" THE COURT BELOW HAS ESTABLISHED A PRECEDENCE OF FEDERAL CONSIDERATIONS OVER STATE LAW HERETOFORE UNKNOWN IN DIVERSITY ACTIONS.

The lower court's formulation and application of a "federal tolling rule" is a direct challenge to this Court's decisions in *Guaranty Trust* and *Erie*. Indeed, the author of the majority opinion, Chief Judge Haynsworth, has invited this Court's review of the decision. In dissenting after the first rehearing en banc Judge Haynsworth stated that continued dialogue on the applicability of *Guaranty Trust* would "at least have afforded the Supreme Court an opportunity for further consideration of the *continuing vitality*" of that decision. Appendix B, p. 18b; emphasis added.

Judge Haynsworth questioned the "vitality" of *Guaranty Trust* again in the majority opinion after the second en banc rehearing. Recognizing the conflict between the instant decision and a "literal application" of *Guaranty Trust*, Judge Haynsworth suggested that the language of *Guaranty Trust* had been "moderated," by *Byrd* v. *Blue Ridge Cooperative*, 356 U.S. 525 (1958) and *Hanna* v. *Plummer*, 380 U.S. 460 (1965). Appendix A, p. 19a. And, it is *Byrd* in which the court finds sanction for granting federal considerations precedence over state law. See Appendix A, p. 20a.

The instant decision conflicts not merely with a "literal application" [12] of *Guaranty Trust* but with the very bases of the *Guaranty Trust* decision. State law, which this Court in *Guaranty Trust* held must be applied in diversity actions where the outcome would be affected, is characterized in the instant decision as "essentially irrelevant."

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[12] Appendix A, p. 19a.

Appendix A, p. 9a. The "sentiments for uniformity," which this Court in *Guaranty* held must be subordinated to the necessity of applying state law, are given primacy in the instant decision.

The crux of the conflict between the instant decision and *Guaranty Trust* is whether a federal court in a diversity case is, as this Court has said, "in effect, only another court of the State." 326 U.S. at 108. If it is, the necessity of applying state law must take precedence over considerations arising from the "relatively unitary" nature of the federal court system. Appendix A, p. 19a.

Diversity jurisdiction was said by this Court, in *Guaranty Trust*, to be founded in assuring the availability of courts free from local bias to non-resident litigants. 326 U.S. at 111. For that reason, "Congress afforded out-of-state litigants another tribunal, not another body of law." 326 U.S. at 112. The court below would afford out-of-state litigants other laws, a "federal tolling rule" (and, perhaps, by extension,[13] a "federal statute of limitations"), as well as other tribunals.

The lower court rejects the Virginia tolling rule because it concludes that the rule is suited for application in a "highly decentralized, relatively autonomous" court system unlike the relatively unitary federal court system. Appendix A, pp. 8a, 19a. Apart from the burden of analyzing state court systems which application of this principle would impose on federal courts, the principle is objectionable because a federal court's application of state laws in a diversity case should not depend on the similarity between the state court system and the federal system. On this point, this Court's language in *Younger* v. *Harris*, —— U.S. ——, 39 U.S.L.W. 4201 (decided February 23, 1971) is particularly apropos. In *Younger*, Mr. Justice Black speaking for the Court stated that our concept of "federalism" is, in part, based on

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[13] See discussion on page 7 herein.

the belief that the National Government will fare best if the states and their institutions are left free to perform their separate functions in their separate ways. 39 U.S.L.W. at 4203.

CONCLUSION

The "federal tolling rule" formulated by the court below would permit the maintenance in federal courts of suits barred by state law and, hence, would encourage increased resort to, and overburdening of, federal courts in diversity actions. In formulating its "federal tolling rule" the court below has established a precedence of federal considerations over state law heretofore unknown in diversity actions.

For the foregoing reasons, the Petition for Certiorari should be granted and the judgment below reversed.

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